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April 1, 1996

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Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: CS Docket No. 96-46  
*Notice of Proposed Rule Making*  
Implementation of Section 302 of the Telecommunications Act of 1996  
Open Video Systems

Dear Mr. Caton:

On behalf of Group W Satellite Communications, a division of Westinghouse Electric Corporation, enclosed herewith for filing with the Commission are an original and eleven copies of *Comments of Group W Satellite Communications*, filed in response to the Commission's *Notice of Proposed Rule Making* in the above referenced proceeding, pursuant to the Commission's rules and policies.

Should there be any questions or concerns, please contact the undersigned.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "S. A. Hildebrandt".

Stephen A. Hildebrandt  
Chief Counsel

encl.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

**COMMENTS OF  
GROUP W SATELLITE COMMUNICATIONS**

Mark Melnick, Esq.

Group W Satellite Communications  
250 Harbor Drive  
Stamford, CT 06904-2210

For itself and on behalf of  
Gaylord Entertainment Company

April 1, 1996

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

**COMMENTS OF  
GROUP W SATELLITE COMMUNICATIONS**

Group W Satellite Communications ("GWSC"), a division of Westinghouse Electric Corporation ("Westinghouse"), by its attorney, hereby files Comments in the above-referenced proceeding. Since 1983, GWSC has been engaged in the businesses of distributing television program services via cable systems and other non-broadcast means, and providing satellite transmission and other television-related technical services.

Currently, the television program services distributed by GWSC include The Nashville Network ("TNN") and Country Music Television ("CMT"). TNN is wholly-owned by Gaylord Entertainment Company ("Gaylord") and CMT is owned by Gaylord and Westinghouse.

These Comments are filed in response to the Commission's Report and Order and Notice of Proposed Rulemaking dated March 11, 1996 and, in particular, to the Notice of Proposed Rulemaking component thereof (the "NPRM") as it relates to the implementation of Section 302 of the Telecommunications Act of 1996, which added, *inter alia*, Section 653 of the Communications Act of 1934 (the "Communications Act"). Those statutes and the Commission's rulemaking thereunder concern the structure and operation of open video systems ("OVS"). Specifically, GWSC's comments relate to the anticipated OVS practice of channel sharing.

### **FCC REGULATIONS MUST ENSURE OPEN COMPETITION AND FAIRNESS IN OVS CHANNEL SHARING PRACTICES**

The shared use of video channels by multiple programming distributors can promote efficiency by effectively increasing the channel capacity of OVS operations. *See* NPRM ¶ 36. However, such use must be subject to regulations that preserve this efficiency while prohibiting the use of channel sharing as a means for anti-competitive or unfair behavior. The FCC can best accomplish this by including in its OVS regulations the following protections:

1. **Programming Ownership (NPRM ¶ 41).** Most fundamentally, OVS regulations must support traditional principles of programming ownership. Program vendors must be free (subject to non-OVS law) to grant, or to deny, permission for the placement of their product on shared channels. The Commission must confirm its tentative conclusion that each provider wishing to market such programming must first obtain permission to do so from the programming vendor.
  
2. **Anti-Discrimination and Program Access (NPRM ¶¶ 39, 61).** Regulations must confirm that OVS operator behavior relating to channel sharing is subject to the anti-discrimination provisions of Section 653(b)(1)(A) of the Communications Act, and to the program access mandates referenced by Section 653(c)(1)(A) of the Communications Act.<sup>1</sup> Channel sharing, like many other distribution practices, is a *tabula rasa* that can be used in competitive or anti-competitive fashion. It may not be necessary for the Commission to *prohibit* OVS operators from requiring channel sharing in certain situations. *See* NPRM ¶ 39. The better approach, at this early stage of OVS development, would seem to be for the Commission to confirm that the Act's anti-discrimination and program access provisions apply to OVS behavior and then to determine on a case-by-case basis whether conduct in question violates those provisions.

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<sup>1</sup> The program access mandates themselves are found at Section 628 of the Communications Act.

There is one area of OVS conduct, however, where regulatory specificity does seem appropriate. The FCC must ensure that OVS operators and their affiliated programming distributors cannot use channel sharing agreements with *un*affiliated programming distributors as a pretext for denying or gatekeeping access to the shared channel's programming. GWSC has learned, from its experience as a video dial tone system programming provider, that it is difficult for private parties to police the creation and implementation of channel sharing agreements between system operators and unaffiliated programming distributors. What may ostensibly be a means of providing system operators with routine technical and legal protections on channel sharing may instead be used as a ruse by such operators to bottleneck and control distribution via insistence in such agreements upon unreasonable or irrelevant provisions. Without clear regulatory constraints on such practices, the risk would exist that programmers that bargain for non-exclusive distribution with an OVS operator would instead have to settle for exclusive subdistributorship. To prevent such an anti-competitive result, the Commission should expressly preclude the use of channel sharing agreements or arrangements as a pretext for wrongful market exclusion or discrimination.


Finally, the Commission must make clear in its regulations that the use of a third party entity -- even one unaffiliated with the OVS operator -- to administer channel

sharing arrangements<sup>2</sup> is no safe harbor against a finding of discrimination or program access violation by an OVS operator. This is because, along with the selection and (presumably *paid*) retention of even an unaffiliated administrator, could come enough control over shared channel access policies to create the risk of anti-competitive results. Here, too, the Commission must be vigilant to prevent wrongful conduct, however veiled.

Implementation of Section 302 of the Telecommunications Act of 1996 in the manner described herein will materially aid in ensuring open competition and fairness in OVS operations.

Respectfully submitted,

GROUP W SATELLITE COMMUNICATIONS,  
for itself and on behalf of  
Gaylord Entertainment Company

By:   
Mark Melnick, Esq.  
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April 1, 1996

Its Attorney

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<sup>2</sup> See NPRM ¶ 37.